88-24

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HELEN CAMPO,

Petitioner,

—against—

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, and THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDGAR PAUK
LEGAL SERVICES FOR
THE ELDERLY
132 West 43 Street
3rd Floor
New York, New York 10036
(212) 391-0120

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether this Court's analysis in Parratt v. Taylor, 451 U.S. 527 (1981) requires the dismissal of a procedural due process civil rights suit under 42 U.S.C. § 1983 - complaining of a deprivation of property without any administrative hearing - , because of the alleged possibility of state judicial review, even though a pre-deprivation administrative hearing is not impractical and the denial of due process is caused by an established state procedure?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. _____

----------x

HELEN CAMPO,

Petitioner,

- against -

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, and THE CITY OF NEW YORK,

Respondents.

----------x

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Helen Campo prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on March 31, 1988.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, dated March 31, 1988, and reported at 843 F.2d 96 (2d Cir. 1988), was subsequently amended on May 31, 1988, and is set forth in full with the amendment at Appendix A herein. The opinion of the District Court for the Southern District of New York, dated February 18, 1987, and reported at 653 F.Supp. 895 (S.D.N.Y. 1987), is set forth at Appendix B herein.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was dated and entered on March 31, 1988. Petitioner filed a timely motion for rehearing and rehearing *in banc*, which was denied on May 25, 1988 in an order set forth at Appendix C herein. This petition for a writ of certiorari was filed within ninety days of the denial of the

motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The constitutional provisions invoked in this petition are Amendment XIV to the United States Constitution and Article V, Section 7 of the Constitution of the State of New York. The federal statutory provision involved is the Civil Rights Act of 1871, 42 U.S.C. § 1983. The state statutory provision involved is the Administrative Code of the City of New York, § 13-101 et seq., more particularly § 13-261. The relevant texts of those provisions are set forth at Appendix D herein.

Statement of the Case

Petitioner's husband, a sanitation worker with seventeen years of employment with the City of New York, was retired involuntarily

by the City because of disability. He selected a retirement option that, upon his death, would provide benefits to his widow and children, and mailed the option election form to NYCERS by certified mail, return receipt requested. He did so after he had undergone major heart surgery, keenly aware that he was dying.

After his death, petitioner applied to NYCERS for survivor's benefits. Benefits were denied, however, on the ground that Mr. Campo's retirement option election allegedly had not been received by NYCERS. Consequently, NYCERS had assigned to him, by default, a retirement option not providing for survivor's benefits. Although Mr. Campo's retirement option election had been sent to NYCERS by certified mail, return receipt requested, and although the return receipt had been received, by the time Mr. Campo died

the receipt had been lost.

Petitioner asked for a hearing by NYCERS in which she would testify and provide witnesses and evidence with regard to the mailing of the option selection to NYCERS, the receipt of the return receipt, her late husband's conversations with friends and relatives with regard to his selection of survivor's benefits, and the recurring problems with receipt of their mail. Petitioner's request was denied, as the Administrative Code of the City of New York containing NYCERS' provisions neither requires nor provides for a hearing, even in a situation like the one at bar, where there are factual disputes and issues of credibility requiring live testimony under oath which could be dispositive of petitioner's pension entitlement.

Petitioner filed this suit pursuant

to the Civil Rights Act of 1871, 42 U.S.C. § 1983, on December 27, 1985, claiming that NYCERS' failure to grant her the hearing she had requested deprived her of property without due process of law, in violation of the Fourteenth Amendment. On respondents' motion, the District Court dismissed the action for failure to state a claim upon which relief could be granted.

On appeal, the Second Circuit affirmed on different grounds. It held that, on the authority of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled in part on other grounds in Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed. 662 (1986), the State of New York had provided petitioner with all the process that was due, because petitioner could have availed herself of an Article 78 special proceeding in the nature of mandamus to

obtain a judicial hearing. According to the Second Circuit, "Parratt teaches that a state may provide procedural due process in either an administrative or a judicial setting." (A-14)

REASONS FOR GRANTING THE WRIT

The writ should be granted, (A) in order to correct the Second Circuit's erroneous reading of this Court's decision in Parratt v. Taylor, supra; and (B), to resolve a conflict between the Second and the Eleventh, Ninth, Seventh and Fifth Circuits in interpreting Parratt.

It has been written that "Parratt v. Taylor is among the most puzzling Supreme Court decisions, of the last decade, and the lower federal courts have been thrown into considerable confusion in their efforts to implement it." H.P. Monaghan, Comment, State

Law Wrongs, State Law Remedies, And the Fourteenth Amendment, Columbia L.R., Vol. 86, No. 5, June 1986. Perhaps that explains why the Second Circuit has misunderstood and misapplied Parratt. Indeed, in another decision issued three days before Campo, another Second Circuit panel reached the opposite conclusion.

In dismissing petitioner's § 1983 complaint, the Second Circuit held that (1) "a state may provide procedural due process in either an administrative or a judicial setting"; and (2), that a procedural due process claim can be brought in federal court only if there exists no effective procedure for relief in the state system." In so holding, the Second Circuit purported to rely on this Court's decision in Parratt, supra. That reading of Parratt, however, is entirely erroneous, and, unless corrected, will

virtually eliminate the proper role of the federal courts in the enforcement of constitutional rights.

At least four other circuits that have had occasion to apply Parratt have not reached the same eviscerating interpretation of the Fourteenth Amendment Due Process of Law clause, which creates a conflict among the circuits to be resolved by this Court.

A. The Second Circuit erred in its reading of Parratt v. Taylor.

It is well settled that "some form of hearing is required before an individual is finally deprived of a property interest [by a state]." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18, 38 (1976). The only issue is whether such an administrative hearing should take place before the occurrence of the deprivation (referred to as a "pre-deprivation hearing"),

or after the deprivation occurred, but before it became final (referred to as a "post-deprivation hearing").

Thus, in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970), this Court held that, before a state terminates public assistance payments to a particular recipient, the Due Process Clause of the Fourteenth Amendment requires that the recipient be afforded the opportunity for an evidentiary hearing closely approximating a judicial trial. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), on the other hand, held that, in the case of a recipient of Social Security Disability benefits, benefits could be cut off before holding a pre-deprivation hearing. Mathews created a three-prong test to determine whether the required hearing should be a pre-deprivation, or a post-deprivation

hearing. In both cases, however, the hearing was to be an administrative hearing.

In Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) this Court held that respondents had a property interest in continued employment which could not be defined by the procedures provided for its termination. Although under Ohio law the respondents were entitled to a post-deprivation administrative hearing and to judicial review, this Court held that due process entitled them also to a pretermination "opportunity to respond." This Court held that "the existence of posttermination procedures is relevant to the necessary scope of pretermination procedures." 470 U.S. at 547, note 12. Because respondents were entitled to a full post-termination hearing, the "pretermination hearing need not definitively resolve the propriety of the

discharge. It should be an initial check against mistaken decisions..." At 545. That holding, the Court noted, "rests in part on the provisions in Ohio law for a full post-termination hearing." At 546. Absent a full administrative, post-termination hearing, due process requires a full pretermination hearing.

In the case at bar, however, petitioner was denied survivor's benefits without benefit of either a full pre-, or post-deprivation hearing. Nevertheless, the Second Circuit upheld the constitutionality of the process by holding that "a state may provide procedural due process in either an administrative or a judicial setting." (A-14). In short, the Second Circuit held that the Due Process Clause did not require an administrative hearing at all, provided judicial review was available. Consequently,

in the Second Circuit's view, the denial of an administrative hearing to petitioner did not violate her constitutional right to due process of law, because the State of New York offered remedies in the courts in the form of an Article 78 special proceeding.

The Second Circuit's holding purports to rely on this Court's decision in Parratt v. Taylor, supra. In Parratt this Court held that an inmate, whose § 1983 claim arose from a negligent loss of property by prison officials, was not entitled to an administrative hearing, but must seek, instead, a judicial hearing in the state court, as state remedies were adequate.

In the case at bar, the Second Circuit discussed at length the adequacy of petitioner's state remedies in the form of an Article 78 special proceeding (A-9-13). Finding that such state remedies were ade-

quate, it held that "the State of New York, through Article 78, offered to Mrs. Campo a due process hearing at a meaningful time and in a meaningful manner." (A-13). The Second Circuit's holding, however, resulted from a totally erroneous reading of Parratt. In fact, Parratt stated:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are ... not the result of some established state procedure ... [so that] the State cannot predict precisely when the loss will occur.

At 541. It is clear that Parratt was not meant to overrule Goldberg and Mathews, but merely confirmed a well-established exception to the rule, namely that,

> either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to

> assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process.

Parratt, at 539.

In the case at bar, however, that exception to the rule is entirely inapplicable. There was no "necessity of quick action by the State"; moreover, an administrative hearing was not "impractical," as the due process violation was not caused by an "unauthorized act of a state employee," but by the very procedures enacted by respondents.

Petitioner was denied survivor's benefits on the ground that her husband had not selected such benefits before he retired. Petitioner, therefore, asked for a hearing in which to provide evidence and witnesses attesting to the fact that her husband did make such a selection. It is hard to understand why such a hearing would have been

"impractical." It is the denial of a hearing by the State's "established procedure" that petitioner asserts violated her right to due process of law. Parratt, therefore, is entirely inapposite to the case at bar.*

In Petrella v. Siegel, 843 F.2d 87 (2d Cir. 1988), another Second Circuit panel held that, where a complainant charged that he was deprived of his public employment without a hearing, the fact that an Article 78 special proceeding was also available to

---

*In order to fit the case at bar within the strictures of Parratt, the Second Circuit mistakenly claimed that there was no "contention in this case that NYCERS' alleged deprivation of Mrs. Campo's asserted property right was anything other than an isolated instance, or resulted from a practice or custom of that agency." (A-8-9, note 4). The "deprivation" petitioner complains about, however, is not the "loss" (whether negligent or not) of her husband's option election by NYCERS, but NYCERS' denial of survivor's benefits without an administrative hearing, pursuant to NYCERS' established procedure. (A-7)

him did not mean that his civil rights action should be dismissed. That panel reasoned that, "although relief [i.e., reinstatement] may be available in state-court review proceedings [pursuant to article 78], it is also available under § 1983, along with additional remedies such as compensatory damages, possible punitive damages, [citations omitted], and a reasonable attorney's fee, 42 U.S.C. § 1988." At 90. Furthermore, relying on Davidson v. Capuano, 792 F.2d 275 (2d Cir. 1986), the Petrella panel held that, although the plaintiff had in fact already won reinstatement in an Article 78 proceeding initiated after the dismissal of his civil rights claim by the district court, "where relief obtainable in civil rights claims is not available in Article 78 proceeding, latter will not bar a subsequent federal action." Petrella, id. The decisions in

Campo and Petrella cannot be reconciled, and are indicative of the "considerable confusion" in which different panels in the same federal circuit have been thrown by Parratt.

B. The Eleventh, Ninth, Seventh and Fifth Circuits differ from the Second in their reading of Parratt.

In Cuellar v. Texas Employment Commission, 825 F.2d 930 (5th Cir. 1987), an unemployment compensation claimant filed a civil rights complaint alleging deprivation of due process in the procedures utilized by the Texas administrative appellate referee during the disqualification hearing. In reversing the district court's dismissal of the complaint, the Fifth Circuit held, citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), that Parratt was inapplicable:

> The existence of post-deprivation remedies through further

> administrative hearings, judicial review, or independent state-law based causes of action are irrelevant to the question of what constitutes adequate hearing procedures, when the deprivation occurs in a non-random, state-authorized hearing convened pursuant to "established state procedures."

At 936.

In Cuellar, unlike the action at bar, a hearing was provided for by state law, and the issue was whether Parratt applied to a challenge to the adequacy of that hearing procedure. The court decided Parratt did not apply "when the deprivation occurs in a non-random, state-authorized hearing convened pursuant to 'established state procedures.'"

If Parratt did not apply in Cuellar, all the more reason it should not apply in the action at bar, where no hearing was provided for by the "established state procedure."

In Fetner v. City of Roanoke, 813 F.2d

1183 (11th Cir. 1987) a former police chief filed a civil rights action against a city, claiming that he had been dismissed in violation of his due process rights, without a hearing. The district court, relying on Parratt, granted summary judgment to defendants, holding that a procedural due process claim could be brought in federal court only if there existed no effective procedure for relief in the state system. In reversing, the Eleventh Circuit noted that "[s]uch a rule would virtually eliminate the role of the federal courts in the enforcement of constitutional rights." At 1184.

The Fetner court held that "[t]he touchstone in Parratt was the impracticality of holding a hearing prior to the claimed deprivation." At 1185. By contrast, in Fetner, as in the action at bar, there was ample time to provide the plaintiff with an

opportunity to be heard before the deprivation became final.

Relying on Logan v. Zimmerman Brush Co., supra, the Eleventh Circuit held that "[p]ost-deprivation remedies do not provide due process if pre-deprivation remedies are practicable." At 1186. It concluded:

> Where, as in this case, a deprivation of property is authorized by an established state procedure and it is practicable for the State to provide pre-deprivation procedures, due process has been consistently held to require pre-deprivation notice and a hearing in order to reduce the possibility of a wrongful deprivation.

At 1186.

In Knudson v. City of Ellensburg, 832 F.2d 1142 (9th Cir. 1987), a former police officer brought an action challenging the denial of disability medical benefits without a hearing. In holding that a post-deprivation

judicial hearing was not sufficient process, the Ninth Circuit, like the Eleventh, stated:

> We apply Parratt and Hudson [v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)] only when "the State administrative machinery did not and could not have learned of the deprivation until after it occurred," not when state officials acted pursuant to state policy and followed state procedures they believed were proper. [Citation omitted] The City terminated medical benefits... and failed to provide a predeprivation hearing because it believed none was required under state law. Its deliberate and considered decision does not fall within Parratt.

At 1149. In the case at bar, respondents did not provide petitioner with a hearing because they "believed none was required under state law." Consequently, their "deliberate and considered decision does not fall within Parratt."

In Wilson v. Civil Town of Clayton, 839 F.2d 375 (7th Cir. 1988) a business owner

filed a § 1983 complaint against a town and town trustees, among others, seeking to recover damages based on the eviction of employees and customers from the business premises. In reversing the district court's dismissal of the complaint pursuant to Parratt, the Seventh Circuit, after discussing Monell v. NYC Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), held that "[i]n a procedural due process case such as this, resolution of the Monell issue will also resolve the Parratt issue." At 380. The Court stated:

> Because a municipality may only be liable [under Monell] for 'acts which the municipality has officially sanctioned or ordered,' [citation omitted], its liability can never be premised on the result of a random and unauthorized act.

In reversing the dismissal of the complaint against the Trustees in their

official capacities, the Seventh Circuit stated:

> Because Parratt applies only to actions that are random and unauthorized, it does not apply to the claims against the Trustees in their official capacities.

At 382. Indeed,

> the Trustees were employed at such high levels of local government that it would be feasible for the Town to provide an opportunity for a pre-deprivation hearing and... the loss may have been the result of a state procedure established by these defendants.

In sum, it is clear that at least four other federal circuit courts which have had occasion to apply Parratt, have held that a civil rights complaint should not be dismissed in favor of proceedings in state courts unless a pre-deprivation administrative hearing is impractical and the deprivation is not caused by an "established state procedure." Because neither condition

applies to the action at bar, the Second Circuit erred in its reading of Parratt and this Court should grant this petition for certiorari.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: June 30, 1988

Respectfully submitted,

EDGAR PAUK
LEGAL SERVICES FOR
THE ELDERLY
132 West 43rd Street,
3rd Floor
New York, N.Y. 10036
(212) 391-0120

Attorney for Petitioner

A P P E N D I C E S

APPENDIX A Opinion of the Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 9—August Term, 1987

Argued: October 7, 1987 Decided: March 31, 1988

Docket No. 87-7237

HELEN CAMPO,

Plaintiff-Appellant,

—v.—

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

LUMBARD AND MINER, *Circuit Judges*, and FRANK A. KAUFMAN, *District Judge*, United States District Court for the District of Maryland, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York (Goettel, D.J.) dismissing plaintiff's claim that defendants' failure to grant her a hearing after notifying her that she would not be receiving a survivor's benefit from her deceased

husband's pension violated the Due Process Clause of the Fourteenth Amendment.

Affirmed.

EDGAR PAUK, New York, NY (Legal Services for the Elderly, New York, NY, of counsel) *for Plaintiff-Appellant.*

LIN B. SABERSKI, New York, NY (Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, NY, of counsel) *for Defendants-Appellees.*

KAUFMAN, *District Judge*:

Justin Campo retired in October, 1980, after seventeen years of employment with New York City's Department of Sanitation, because of a disabling illness. In December, 1980, the New York City Employees' Retirement System (NYCERS) approved its Medical Board's recommendation concerning Mr. Campo's retirement and began to pay retirement benefits to him in January, 1981.

NYCERS states that it mailed a letter to Mr. Campo dated March 26, 1981 which set forth the sums of money to which Mr. Campo would be entitled under various alternative retirement options and gave Mr. Campo the opportunity to select the option of his choice. Mrs. Campo, wife of Mr. Campo and plaintiff in this case, claims that, as far as she knows, her husband never received that letter. NYCERS also says it sent to Mr. Campo a letter dated May 5, 1981, advising him that if he did not select an op-

tion within sixty days, NYCERS, according to its established procedures, would select for him the option providing for the maximum lifetime benefit with no survivor's benefit. The record does not disclose Mrs. Campo's position as to whether her husband received the May 5, 1981 letter. In any event, Mrs. Campo states that her husband, in her presence, (1) filled out a pension application form sometime between March 16, 1981 and May 11, 1981; (2) selected Option I, which provides for a survivor's benefit; and (3) mailed that form to NYCERS by certified mail, return receipt requested. Mrs. Campo further states that the return receipt was received by her husband, and that she watched him place it in a desk drawer. However, Mrs. Campo says she has been unable to find that receipt. She states that her husband received only one further letter from NYCERS, in August, 1981, informing him about Internal Revenue Service reporting requirements with regard to his retirement arrangements. That letter also noted that Mr. Campo had $115,333.48 in reserve in his retirement account. Mrs. Campo says that, as far as she knows, her husband never received any notice from NYCERS indicating that his application for Option I benefits had not been received.

Mr. Campo apparently received benefit payments from NYCERS for about three years before he died on May 27, 1984. One week later, NYCERS mailed to Mrs. Campo a letter informing her that she would not receive any survivor's benefit. On October 9, 1984, Mrs. Campo went to a NYCERS office, where she was told that her husband had selected an option which did not provide for a survivor's benefit. However, on that occasion, NYCERS personnel were unable to produce a document reflecting that selection by Mr. Campo. They told Mrs. Campo that NYCERS had selected the maximum lifetime payments option for

her husband because he had not responded within sixty days of the May 5, 1981 letter.

On June 25, 1985, Mrs. Campo's counsel filed an appeal by letter with NYCERS, setting forth her version of the facts and indicating that Mrs. Campo desired to testify at a hearing concerning her husband's election of benefits. By letter dated July 10, 1985, NYCERS denied Mrs. Campo's appeal without granting her a hearing. Apparently, the New York City Administrative Code[1] does not require a hearing either before or after a beneficiary like Mrs. Campo is denied retirement benefits by NYCERS, nor does NYCERS appear to provide a hearing under those circumstances.

On December 27, 1985, Mrs. Campo filed this section 1983 action in the United States District Court for the Southern District of New York, claiming that NYCERS' failure to grant her the hearing she had requested deprived her of property without due process of law, in violation of the Fourteenth Amendment. Mrs. Campo also advances several state law causes of action against NYCERS, including violations of the New York State Constitution, breach of contract and breach of fiduciary duty.

The district court granted NYCERS' motion to dismiss, concluding that the informal procedures used by NYCERS to review Mrs. Campo's claim and the availability of state court Article 78 and breach of contract actions provide the required procedural due process. In this appeal, Mrs. Campo challenges that holding.[2]

---

1 New York City Administrative Code § 13-177 *et seq.* (1986). *See* Amended Complaint at 9.

2 The district court, after concluding that Mrs. Campo had failed to state a federal cause of action, declined to exercise pendant jurisdiction over the state law claims. We agree with that disposition.

NYCERS urges two grounds for affirmance of the decision below. First, NYCERS takes the position that Mrs. Campo's claim is predicated on alleged negligent acts or omissions by NYCERS in handling her husband's benefits selection and that such negligence cannot give rise to a procedural due process claim in the light of *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986). The district court apparently concluded that Mrs. Campo's claim was not grounded in negligence, and therefore did not address that issue.

NYCERS' second contention, that its denial to Mrs. Campo of an administrative hearing did not deprive her of due process because the State of New York offers adequate remedies in its courts, goes to the heart of this case. The district court, after expressing doubt as to whether Mrs. Campo has a property interest in her husband's pension, assumed that such an interest exists and then applied the standards enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether NYCERS should have given her a hearing. In so doing, the district court concluded that NYCERS' informal review of Mrs. Campo's claim and the availability of either an Article 78 proceeding or a breach of contract action in state court to entertain Mrs. Campo's challenge, provided all the procedural process due her under the U.S. Constitution.

DISCUSSION

I.

42 U.S.C. § 1983 provides as follows:

> Every person who, *under color of any statute*, ordinance, regulation, custom, or usage, *of any State* or

> Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any rights*, privileges, or immunities *secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(Emphasis added).

NYCERS is a New York City administrative agency which qualifies as a "person" acting "under color" of state law. *See Monell v. Dep't of Social Services*, 436 U.S. 658, 669 (1978). Mrs. Campo has alleged that NYCERS has deprived her of a property interest without due process of law.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), Justice Stewart wrote that "[t]he Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-72 (footnote omitted). The New York State Constitution provides that "membership in any pension or retirement system of the state or a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." N.Y. Const. art. V, § 7. In this case, Mrs. Campo claims that she was designated by her husband as his beneficiary. The district court, in granting NYCERS' motion, assumed that Mrs. Campo has asserted a property interest. We also so assume in the context of this appeal. Therefore, Mrs. Campo has stated a cause of action under 43 U.S.C. § 1983 if she has been denied procedural due process.

II.

The core issue presented by Mrs. Campo is whether NYCERS' refusal to hold the administrative hearing she requested violates her right to procedural due process. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court established standards for determining when a hearing is necessary *prior* to the deprivation of a claimed property interest. In *Mathews*, the plaintiff had been denied a trial-type hearing prior to a final determination that he was not eligible for Social Security disability payments. In this case no pre-deprivation hearing was needed or could have taken place. Because a judicial hearing in a state court was available to Mrs. Campo on timely demand, due process requirements for a post-deprivation hearing are met for the reasons discussed *infra*, regardless of the application, *vel non*, of *Mathews*.[3]

III.

The fact that Mrs. Campo has a due process right to a hearing does not in and of itself mean that the hearing must take place at the administrative level. Mrs. Campo complains only of NYCERS' failure to grant her a hearing and "refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment *simpliciter*." *Parratt v. Taylor*, 451 U.S. 527, 536 (1981),

---

3 Although *Mathews* only addressed the issue of when a pre-deprivation trial-type hearing is required, the *Mathews* standards generally have been used to determine the nature and timing of due process hearings, whether pre- or post-deprivation. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 675-83 (1977); *Signet Construction Corp. v. Borg*, 775 F.2d 486, 490-92 (2d Cir. 1985); *McClelland v. Massinga*, 786 F.2d 1205, 1210-16 (4th Cir. 1986); *Tomai-Minogue v. State Farm Mut. Auto. Ins. Co.*, 770 F.2d 1228, 1232-36 (4th Cir. 1985); *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1113-14 (D.C. Cir. 1985).

overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

In *Parratt*, an inmate of a Nebraska prison brought a section 1983 action against prison officials who allegedly lost certain hobby materials which the inmate had ordered by mail. Those officials, plaintiff asserted, did not follow normal mail handling procedures required by the prison's own operating procedures. No administrative hearing was available to plaintiff, who claimed that the loss of his property without provision of an administrative hearing denied him procedural due process. In rejecting plaintiff's contention, Justice Rehnquist wrote:

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of law."

451 U.S. at 536-37 (footnote and citation omitted).

In *Parratt* the Supreme Court held that the tort remedies provided by Nebraska in its state courts offered the prisoner adequate procedural due process. *Id.* at 544.[4] That

4 There was no claim in *Parratt* that the alleged tortious act was part of a particular custom or policy of the Nebraska penal authorities. Nor is there any contention in this case that NYCERS' alleged deprivation of Mrs. Campo's asserted property right was anything other than an isolated instance, or resulted from a practice or custom of that agency.

holding has been applied to non-tort actions involving only procedural due process claims. *See, e.g., Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 888 (2d Cir. 1987); *Giglio v. Dunn*, 732 F.2d 1133, 1135 (2d Cir.), *cert. denied*, 469 U.S. 932 (1984).

IV.

Article 78 of the New York Civil Practice Law and Rules provides a summary proceeding which can be used to review administrative decisions. That article makes available types of relief which, before its enactment, were obtainable in New York's courts only by writs of certiorari, mandamus or prohibition. Specifically, Article 78 states, in pertinent part, as follows:

> The only questions that may be raised in a proceeding under this article are:
>
> 1. whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .; or
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursu-

---

See also Bandes, *Monell, Parratt, Daniels and Davidson: Distinguishing a Custom or a Policy from a Random, Unauthorized Act*, 72 Iowa L. Rev. 101, 122-23 (1986). Accordingly, this Court treats Mrs. Campo's claim as based on an isolated incident, as did the Supreme Court when it considered the claim in *Parratt*.

ant to direction by law is, on the entire record, supported by substantial evidence.[5]

Article 78 "provides the mechanism for challenging a specific decision of a state administrative agency." *Liotta v. Rent Guidelines Board*, 547 F. Supp. 800, 802 (S.D.N.Y. 1982). Mrs. Campo argues that Article 78 is not an adequate remedy because (1) in an Article 78 court she carries the burden of overcoming a presumption of administrative regularity and (2) the Article 78 court will not itself assess the credibility and reliability of her testimony but rather will confine itself to deciding whether NYCERS' denial of her claim was arbitrary and capricious. An Article 78 court can, however, entertain Mrs. Campo's procedural due process challenge and decide if a remand for an administrative hearing is required.

In *Solnick v. Whalen*, 49 N.Y.2d 224, 401 N.E.2d 190, 425 N.Y.S.2d 68 (1980), the Court of Appeals of New York noted that an Article 78 proceeding was available to challenge procedures used to revise Medicaid reimbursement rates. In *Solnick*, Judge Jones wrote that such a challenge is "available as a question for review in such a proceeding under the third question authorized by CPLR 7803—whether the 'determination was made in violation of lawful procedure [or] was affected by an error of law'." 49 N.Y.2d at 231, 401 N.E.2d at 194, 425 N.Y.S.2d at 72. If the record before the Article 78 court demonstrates a lack of appropriate procedure, the Article 78 court has the authority and seemingly the duty to order the agency to conduct a proper hearing, regardless of the type of substantive claim involved. *See In the Matter of Pasta Chef, Inc. v. State Liquor Auth.*, 54 A.D.2d 1112, 389 N.Y.S.2d

5 N.Y. Civ. Prac. L. & R. 7803.

72 (4th Dep't 1976), *aff'd*, 44 N.Y.2d 766, 377 N.E.2d 480, 406 N.Y.S.2d 36 (1978). Thus, if Mrs. Campo had timely sought Article 78 review, a New York court would have had the authority to remand this case to NYCERS for an appropriate administrative proceeding.

The procedures afforded by Article 78 have been held to constitute appropriate review of whether a rent guideline order was invalid because it was adopted at a meeting allegedly so unruly that the landlord plaintiffs were deprived of property without due process of law. *See Liotta v. Rent Guidelines Board, supra.* In *Liotta*, the district court commented as follows about the availability of an Article 78 proceeding:

> Plaintiffs cannot manufacture a § 1983 claim by pointing to the allegedly defective meeting while ignoring that part of the regulatory process that serves to redress administrative error. Rather, in considering whether defendants have failed to afford plaintiffs due process in connection with the rent guidelines, the Court evaluates the entire procedure, including the adequacy and availability of remedies under state law.

Id. at 802.

In *Giglio v. Dunn*, 732 F.2d 1133, 1135 (2d Cir.), *cert. denied*, 469 U.S. 932 (1984), Judge Van Graafeiland concluded that a tenured high school principal, who claimed that his resignation was coerced, could challenge the voluntariness of his resignation in an Article 78 proceeding and that that opportunity provided all the process constitutionally due. After noting that plaintiff's right to seek review under Article 78 was apparently barred by the four-month statute of limitations period for instituting an Article 78 action, Judge Van Graafeiland wrote that "so long

as appellant had a reasonable time in which to seek Article 78 relief, he cannot make a legitimate claim of due process violation because his claim now may be barred." *Id.* at 1135 n.1.[6] This Court has expressed similar views in *Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir. 1984), where a health care provider brought a section 1983 action alleging that its Medicaid reimbursement rate had been reduced by a New York state agency without a hearing, and in *Eastway*, where a construction company claimed that it had been denied, without due process of law, the opportunity to engage in public redevelopment projects. *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 250 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

In *Escalera v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970), tenants in Housing Authority (HA) projects brought a section 1983 suit for violations of their due process rights to challenge eviction and penalty orders of the HA. The HA took the position that any due process defects in the procedures it had used for terminating tenancies were reviewable and curable in an Article 78 proceeding. Rejecting that position, Judge Smith wrote:

> Although upon commencement of an article 78 action, the holdover action by the HA may be stayed, the tenant must in effect prove that the HA decision was arbitrary and capricious or an abuse of discretion in order to get relief. Thus, the tenant has the burden

---

6 N.Y. Civ. Prac. L. & R. 217 provides for a four-month statute of limitations for Article 78 actions. Since NYCERS denied Mrs. Campo's appeal on July 10, 1985, Mrs. Campo may be barred by limitations from presently proceeding pursuant to Article 78. However, the fact that Article 78 may not now be available to Mrs. Campo for that reason would not affect the result herein because Mrs. Campo had available an Article 78 remedy whether she timely utilized it or not. *See also Solnick*, 49 N.Y.2d at 231, 401 N.E.2d at 194, 425 N.Y.S.2d at 72.

> of commencing an article 78 action and of overcoming the presumption of regularity attacking the acts of the HA. Moreover, the tenant must carry this burden without access to his own folder, the exact basis for the HA decision against him or a transcript of the [Board] hearing. Such review commenced by the tenant cannot be a substitute for fair procedures in the decision of the HA in the first instance.

Id. at 866 (footnote omitted). However, *Escalera* focused on pre-deprivation procedures and did not discuss whether the Article 78 court could have been asked to remand the case to the HA for an administrative proceeding in a post-denial context to be conducted in full accord with procedural due process standards, and therefore does not affect the outcome of this case.

In the light of those authorities we hold that the State of New York, through Article 78, offered to Mrs. Campo a due process hearing at a meaningful time and in a meaningful manner.[7]

---

7 As the district court noted, Mrs. Campo may also have available to her, in addition to Article 78 review, a breach of contract claim against NYCERS in a New York state court. The New York Constitution provides that "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship . . . ." N.Y. Const. art. V, § 7. Thus, Mrs. Campo may be able successfully to assert a contract claim. The availability of such an action in the New York courts in and of itself may provide a "meaningful means by which to assess the propriety" of NYCERS' action "at some time after the initial taking," and may therefore "satisfy the requirements of procedural due process." *Parratt*, 451 U.S. at 539 (footnote omitted). We note that limitations may not affect Mrs. Campo's ability to pursue a breach of contract claim since N.Y. Civ. Prac. L. & R. 213 provides a six-year limitations period for breach of contract actions with limitations generally beginning to run at the time of the breach. *See Medical Facilities, Inc. v. Pryke*, 62 N.Y.2d 716, 717, 465 N.E.2d 39, 41 (1984). However, if Mrs. Campo institutes a state court

V.

Our conclusion does not offend the doctrine of nonexhaustion of state remedies set forth in *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982) (state administrative remedies) and *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (state judicial remedies). Mrs. Campo has asserted only one claim under federal law, *i.e.*, denial of procedural due process pursuant to the Fourteenth Amendment. Mrs. Campo has not been required first to present and to exhaust that contention in a state court. Rather it has been entertained—and decided against her—in this federal case because, as discussed *supra*, *Parratt* teaches that a state may provide procedural due process in either an administrative or a judicial setting. *

[*See amendment to opinion, dated March 31, 1988, on p. A-15]

---

contract action it will be up to the state court in which that proceeding takes place to make that determination. As indicated *supra* at _____ n.6, the fact that limitations may or may not have run in connection with Mrs. Campo's exercise of her rights in a state court does not mean that Mrs. Campo has not been afforded an appropriate due process opportunity.

Amendment to Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of May, one thousand nine hundred and eighty-eight.

87-7237

----------x

HELEN CAMPO,

Plaintiff-Appellant,

v.

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and THE CITY OF NEW YORK,

Defendants-Appellees.

----------x

(Filed May 31, 1988)

A petition for rehearing, with a suggestion for rehearing in banc, having been filed by appellant in the above-entitled case,

Upon consideration by the panel that heard the appeal, it is ordered as follows:

1. The opinion of the Court filed March 31, 1988 is amended as follows: At slip sheet page 17, on line 4, footnote 8 is inserted immediately after "a judicial setting." The footnote reads as follows:

[8]Mrs. Campo seeks procedural due process in pursuit of a contract-type claim which does not, for the reasons stated in Part II, supra, present the occasion for a predeprivation hearing. Nor does her claim involve the possibility of any remedy in a § 1983 proceeding which is apparently unavailable in a proceeding in a New York state court. See Davidson v. Capuano, 792 F.2d 275

(2d Cir. 1986); Petrella v. Siegel, ___ F.2d ___, No. 77-1205 (2d Cir. March 28, 1988).

2. The petition for rehearing is DENIED.

/s/
J. EDWARD LUMBARD,
Circuit Judge,

/s/
ROGER J. MINER,
Circuit Judge,

/s/
FRANK A. KAUFMAN, Senior District Judge, United States District Court for the District of Maryland, sitting by designation.

APPENDIX B

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HELEN CAMPO,

Plaintiff

- against -

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM AND THE CITY OF NEW YORK,

Defendants

85 C 10055 (GLG)

O P I N I O N

A P P E A R A N C E S

EDGAR PAUK, ESQ.
Attorney for Plaintiff
Legal Services for the Elderly
132 West 43 Street - 3rd Fl.
New York, New York 10036

By: Edgar Pauk, ESQ.
Of Counsel

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007

By: David Drueding, Esq.
Anne Carson, Esq.
Of Counsel

G O E T T E L, D.J.:

The plaintiff, Helen Campo, is the widow of a former employee of the New York Department of Sanitation ("Department"). The defendants are the City of New York ("City"), and the New York City Employees' Retirement System ("NYCERS"), which provides retirement benefits to City employees and their designated beneficiaries. The defendants move to dismiss the amended complaint for failure to state a claim on which relief can be granted. Fed. R.Civ. P. 12(b)(6). The plaintiff cross-moves for sanctions against the defendants for filing a groundless and frivolous motion. As discussed below, the defendants' motion to dismiss is granted and the plaintiff's motion for sanctions is denied.

Background

The plaintiff's husband worked for the Department for seventeen years. In October

1980, he was forced to retire because of a disabling illness. In November 1980, he received a form from NYCERS, which he completed and returned to obtain information about the various retirement plans that were available to him.

In December 1980, NYCERS advised Mr. Campo that it had accepted the Department Medical Board's recommendation to retire him on ordinary disability. He began receiving pension benefits in January 1981.[1/]

Between March 2, and March 16, 1981, Mr. Campo was in Texas to undergo heart surgery. The plaintiff alleges that, shortly after her husband returned from Texas, he filled out the pension application form in her presence, selecting "Option I,"[2/] which he said would pay the plaintiff survivor's benefits after he died. She claims he returned the papers to NYCERS by certified

mail, return receipt requested, and that the receipt was returned in due course. However, the plaintiff can no longer locate the receipt.

On March 26, 1981, NYCERS purportedly wrote to Mr. Campo, advising him how much money he would receive monthly under the various retirement option plans. The plaintiff asserts that, so far as she knows, her husband never received this letter.[3/] According to the amended complaint, the only correspondence Mr. Campo received from NYCERS was a letter, in August 1981, regarding certain tax aspects of his pension.

Mr. Campo died on May 27, 1984, at the age of 53. One week later, NYCERS notified the plaintiff that she would not receive survivor's benefits.[4/] Mrs. Campo wrote to the Mayor protesting NYCERS' action, and insisting that her husband had selected a

retirement option that specifically provided for her to receive survivor's benefits, which were now being denied to her.

Mrs. Campo's letter was referred to NYCERS. On October 4, 1984, NYCERS responded, enclosing a copy of its letter to Mr. Campo, dated March 26, 1981, which set forth the amount of payments under the different option plans. Presumably, the March 26th letter, which the plaintiff asserts her husband never received, would have revealed that the monthly payments Mr. Campo was receiving were higher than they would have been under Option I.

On October 9, 1984, after receiving NYCERS' October 4th letter, Mrs. Campo visited NYCERS. At first, she was told that her husband had selected the "maximum" plan, which pays the highest benefits to the retiree during his lifetime, but provides no

survivor's benefits. After she asked to see the document reflecting that selection, a NYCERS employee told her that NYCERS had never received any selection form from her husband. The employee said that NYCERS had sent her husband a notice indicating that he had sixty days to respond and choose an option plan before being listed as having selected the irrevocable "maximum option" by default.[5/] Mrs. Campo asserts that her husband did not receive this notice, which was supposedly sent by regular mail on May 5, 1981. The plaintiff contends that NYCERS should have sent this notice by certified mail, return receipt requested, to be sure it was received.[6/]

On June 25, 1985, plaintiff's counsel wrote to NYCERS to appeal its denial of the plaintiff's survivor's benefits. The plaintiff offered to testify at a hearing. NYCERS

denied her appeal without conducting a hearing. Mrs. Campo asserts that she has been deprived of a valuable property right.[7/] She contends that NYCERS' refusal to afford her a hearing was a deprivation of property without due process of law in violation of the fourteenth amendment of the United States Constitution. The complaint states other causes of actions that similarly allege a deprivation of due process of law, and several pendent state law claims.

Discussion

The defendants move to dismiss the complaint arguing first that the plaintiff's claims are predicated upon an alleged negligent act or omission by NYCERS, namely, losing or misplacing Mr. Campo's letter selecting Option I for his retirement plan. The defendants assert that negligent acts by NYCERS or the City do not constitute a

cognizable due process claim. See Daniels v. Williams, 106 S. Ct. 662, 664-66 (1986); Davidson v. Cannon, 106 S. Ct. 668, 670 (1986). The plaintiff responds that her federal causes of action are not based on defendants' negligence. Accordingly, we need not address this aspect of the defendants' motion to dismiss.

The defendants' second basis for moving to dismiss is that, even if the plaintiff has been deprived of a property interest, she has still not been deprived of due process because adequate procedures are available to bring her claim in an article 78 proceeding pursuant to N.Y. Civ. Prac. Law & R. § 7803 (McKinney 1981), or, alternatively, in a state court action for breach of contract. The plaintiff asserts that the defendants fail to understand that her federal claims for deprivation of property without due

process challenge the adequacy of the defendants' procedures, not merely the denial of her claim, and, as such, constitute a cognizable constitutional claim. She argues, in effect, that she has a constitutional right to a hearing before the defendants can finally deny her claim for survivor's benefits.

A threshold issue in considering the plaintiff's claims is whether she has a viable property interest upon which to base a claim for deprivation without due process. This is not as clearcut as the plaintiff would have us believe. Certainly her husband had a property interest in his retirement benefits. See Basciano v. Herkimer, 605 F.2d 605, 609 (2d Cir. 1978); Gendalia v. Gioffre, 610 F. Supp. 363, 366 (S.D.N.Y. 1985); Siletti v. New York City Employees' Retirement System, 401 F. Supp. 162, 167 (S.D.N.Y. 1975). However, Mrs. Campo had no direct

interest in those benefits. Her claim is asserted as a third-party beneficiary under her husband's contract with the defendants. Her interest, if any, is a future contingent interest, or a chose in action, based on her contention that (1) she was named as her husband's beneficiary, (2) he selected a plan that provided survivor's benefits, and (3) she survived her husband. These claims may well state a cause of action upon which Mrs. Campo has a right to sue. However, they do not necessarily entitle her to an administrative hearing.

Since the defendants have moved to dismiss, we must give plaintiff's factual allegations the most favorable interpretation. The "complaint should not be dismissed ... unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle

[her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). Consequently, we hesitate to resolve the instant motion based solely on the questionable validity of the plaintiff's property interest. Assuming that Mrs. Campo has a valid claim for survivor's benefits under her husband's retirement plan, and assuming that this constitutes a property interest, we must ask whether she was deprived of this property interest without due process.

As a general rule, an individual is entitled to some form of hearing before being finally deprived of a property interest. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The nature and time of such a "hearing" may vary enormously depending on the circumstances of any particular situation. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982). The Supreme Court has held

that when the property involved constitutes the "very means by which to live" a hearing must take place prior to even an initial deprivation. Goldberg v. Kelly, 397 U.S. 254, 264 (1970). When, however, the deprivation does not necessarily implicate a basic means of sustenance, a post-deprivation hearing may afford adequate due process protection. See Logan v. Zimmerman Brush Co., supra, 455 U.S. 422; Mathews v. Eldridge, supra, 424 U.S. 319.

In Mathews v. Eldridge, the Supreme Court established a three-prong test for determining the constitutional sufficiency of administrative procedures. The Mathews test requires the court to consider.

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of

> additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The private interest in this suit is the plaintiff's claimed right to survivor's benefits under her late husband's retirement pension plan. However, pension benefits, including survivor's benefits, do not necessarily implicate "the very means by which to live." Goldberg v. Kelly, supra, 397 U.S. at 264. Cf. Mathews v. Eldridge, supra, 424 U.S. at 318-19 (disability benefits not based on financial need). Thus, no pre-deprivation hearing is required. The plaintiff argues, however, that the defendants failed to provide even a post-deprivation hearing, and that this violated her fourteenth amendment

right to due process. Consequently, we move on to the second prong of the Mathews test to examine whether the procedures used by NYCERS, which did not include an administrative hearing, created a risk of erroneous deprivation.

We first note that not every situation will require a "trial-type hearing" in which witnesses are examined and cross-examined. See Basciano v. Herkimer, supra, 605 F.2d at 610-11; Siletti v. NYCERS, supra, 401 F. Supp. at 167. Mrs. Campo presented her claim by letter to the Mayor. Her letter was forwarded to NYCERS for consideration. She also visited NYCERS where she was advised of its procedures and the reasons for NYCERS' decision, based upon documents in its files regarding her husband's retirement plan. The plaintiff's counsel thereafter wrote to NYCERS to appeal its denial of the plaintiff's

claim for survivor's benefits. NYCERS responded, denying the appeal.

We find the risk of erroneous deprivation in this case must be deemed minimal. Unlike a case involving a welfare recipient's entitlement to continued benefits, or even a disabled person's claim of disability, the resolution of the plaintiff's claim revolves around documentary evidence -- the correspondence between NYCERS and Mr. Campo. The plaintiff presses for a hearing as necessary to evaluate the credibility of witnesses, mostly herself, to contend that her husband chose a certain retirement option, returned the proper form, and often did not receive mail sent to him. We find the probable value of such an administrative hearing is minimal since it is unlikely to unearth information other than the correspondence in NYCERS' files and the claims Mrs. Campo has already

made by letter and personal appearance at NYCERS' office.

Under the third part of the Mathews test, we must balance the plaintiff's interest in receiving the claimed survivor's benefits against the burden upon the defendants of requiring them to provide an administrative hearing to anyone challenging the terms of a NYCERS retirement option plan. The burden on the defendants is clearly the overwhelming consideration. The City employs vast numbers of workers. Were each retiree (or a surviving relative) who was dissatisfied with his or her benefits entitled to an administrative hearing, the City might soon run out of money to pay any benefits at all. Such a requirement would also be more likely to slow the processing of retirement claims than to expedite them.

As the defendants have noted, anyone with

a claim against an administrative decision may seek speedy judicial relief in a state court proceeding pursuant to article 78, N.Y. Civ. Prac. Law & R. 7803 (McKinney 1981). This includes a challenge to the administrative procedures as well as the decision. See Solnick v. Whalen, 49 N.Y.2d 224, 401 N.E.2d 190, 425 N.Y.S.2d 68, 72 (1980). Moreover, Mrs. Campo has a second avenue for seeking relief, i.e., a state common law action for breach of the contract. The New York State Constitution considers a City employee's participation in a pension plan to be a contractual relationship. See supra note 7. Since the plaintiff claims to be a third-party beneficiary of her husband's pension, she could assert her contractual claim for survivor's benefits in state court. She fails, however, to state a federal cause of action for deprivation of constitutional

rights.

Conclusion

The plaintiff fails to state a federal claim upon which relief can be granted.[8/] Her alleged property interest is, arguably, insufficient for purposes of stating a due process claim. However, even assuming the validity of such an interest, an analysis of the factors enumerated in Mathews v. Eldridge demomonstrates that the defendants have provided the plaintiff with adequate due process of law. Accordingly, we grant the defendants' motion to dismiss.[9/] The Clerk shall enter judgment for the defendants.

SO ORDERED.

Dated: White Plains, N.Y.
February 18, 1987

/s/
GERARD L. GOETTEL
U.S.D.J.

FOOTNOTES

1/ As of January 1981, Mr. Campo had not yet selected a retirement option plan. Neither party indicates the amount of the payments he began receiving that month, or under what retirement option plan the payments were being made.

2/ As set forth by the plaintiff, Option I provided, in relevant part, that,

> Until the first payment on account of any benefits is made, the beneficiary [i.e., the member] ... may elect to receive such benefit in a retirement allowance payable throughout life, or the beneficiary ... may ... elect to receive the actuarial equivalent at that time of ... his pension ... in a lesser pension payable throughout life with the provision that:
>
> Option 1.a. If he die before he has received in payments the present value of ... his pension ... as it was at the time of his retirement, the balance shall be paid, in the form of a lump sum or the

> actuarial equivalent in the form of an annuity, to his legal representatives or to such person as the beneficiary ... has nominated or shall nominate by written designation duly acknowledged and filed with the Board.

[New York City Administrative Code §] B3-46.0. Amended Complant ¶ 13.

3/ Mrs. Campo notes that mail was frequently stolen from their home mailbox and that this may explain the Campo's non-receipt of NYCERS' correspondence.

4/ The amended complaint does not indicate whether NYCERS learned of Mr. Campo's death independently or was simply responding to a claim by Mrs. Campo for survivor's benefits.

5/ Apparently, it is NYCERS' practice to assign the "maximum option" by default when no other option is selected by the retiree. Amended Complaint ¶ 20. At oral argument, defendants' counsel stated that the

applicable regulations compel this procedure.

6/ Paradoxically, Mr. Campo's alleged use of certified mail, return receipt requested, to send correspondence to NYCERS did not necessarily ensure receipt. NYCERS claims not to have received the pension selection papers purportedly sent by Mr. Campo. The plaintiff says the receipt was returned by Mr. Campo. The plaintiff says the receipt was returned but she cannot locate it. Moreover, even if she were able to find the receipt, it alone would not confirm the contents of the certified delivery.

7/ Pursuant to the New York State Constitution, "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." N.Y. Const. art. V, § 7. However, the "member" here was Mr.

Campo, not the plaintiff.

8/ Having found that the plaintiff fails to state a federal cause of action for deprivation of due process, we decline to exercise jurisdiction over her pendent state claims.

9/ Since we grant defendants' motion to dismiss, it follows that it was not frivolous, and we deny plaintiff's motion for sanctions.

APPENDIX C

Order of the Court of Appeals for the Second Circuit Denying Petition for Rehearing and for Rehearing in Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of May, one thousand nine hundred and eighty-eight.

87-7237

----------x

HELEN CAMPO,

Plaintiff-Appellant,

v.

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and THE CITY OF NEW YORK,

Defendants-Appellees.

----------x

(Filed May 25, 1988, Elaine B. Goldsmith, Clerk)

A petition for rehearing containing a suggestion that the action be reheard in

banc having been filed herein by counsel for the plaintiff-appellant, Helen Campo.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/_____
Elaine B. Goldsmith

APPENDIX D: Relevant Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION AND STATUTES

Amendment XIV to the United States Constitution

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

NEW YORK CONSTITUTION AND STATUTES

Article V, Section 7 of the New York Constitution

§ 7. [Membership in retirement systems; benefits not to be diminished nor impaired]

After July first, nineteen hundred

forty, membership in any pension or retirement system of the state or civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

§ 13-261 of the Administrative Code of the City of New York

§ 13-261. Retirement; options in which retirement allowances may be taken.

a. Until the first payment on account of any benefits is made, the beneficiary, or, if such beneficiary is an incompetent, then the husband or wife of such beneficiary, or, if there be no husband or wife, a committee of the estate, may elect to receive such benefit in a retirement allowance payable throughout life, or the beneficiary or the husband or wife or committee so electing may then elect to receive the actuarial equivalent at that time of his or her annuity, his or

her pension, or his or her retirement allowance in a lesser annuity or a lesser pension or a lesser retirement allowance, payable throughout life with the provision that:

Option 1. If he or she die before he or she has received in payments the present value of his or her annuity, his or her pension, or his or her retirement allowance, as it was at the time of his or her retirement, the balance shall be paid to his or her legal representatives or to such person as the beneficiary, or the husband or wife or committee so electing, has nominated or shall nominate by written designation duly acknowledged and filed with the board.

.....